Supreme Court, U.S.
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No. 97-1740

In The

Supreme Court of the United States

October Term, 1997

WENDY LEE WILSON
and STEVIE BURNS,

Petitioners,

versus

LEON "Buddy" NUTT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can a supervisor or agent of an employer be held liable as an individual pursuant to Title VII, 42 U.S.C. § 2000e(b) after Plaintiffs have settled the case with the employer agency?

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STATEMENT OF THE CASE

In 1992, Petitioner Wendy Wilson was employed as a dispatcher for the Wayne County Sheriff's Department. Petitioner Stevie Burns was also employed by Wayne County as an officer with alternate duties of both dispatcher and deputy. Petitioner Wilson was hired with the understanding she would be leaving the position on July 31 to attend school. When she later changed her mind and requested to stay with the Sheriff's office, Respondent Nutt explained that her replacement had already been hired, but that she might be able to work on a part-time basis. He made no suggestions during any conversation with Petitioner regarding an exchange of sexual favors for an extension of her job period.

On July 13, 1992, Sheriff Nutt called Petitioner Wilson to his office and made sexual advances toward her. By Petitioner's own admission, she made no verbal objection and did not resist. The two had sex in the Sheriff's office. Further,

> Sheriff Nutt never threatened Ms. Wilson, nor did he explicitly offer her any reward, such as continued employment, in exchange for sexual favors. The sheriff's son was asleep in the living quarters, just a few yards from the office, during the entire time Ms. Wilson and the sheriff were inside. Had Ms. Wilson called out, the son would have heard. *Wendy Lee Wilson v. Wayne County*, 856 F. Supp. 1254 (M.D. Tenn. 1994) (A-9 of Petitioners' Brief).

Petitioner Wilson then reported the incident as a rape after discussing the matter with her boyfriend Petitioner Burns. It was Petitioner Burns who actually reported the

incident, both to his supervisor, Sergeant Charles Crosslin, and to the district attorney's office. The grand jury did not indict Respondent on these charges. Petitioner Wilson chose not to complete her work term, and Petitioner Burns was later discharged.

Pursuant to Title VII, 42 U.S.C. § 2000e, Petitioners filed suit against Wayne County, the Wayne County Sheriff's Department and Sheriff Leon Nutt, alleging sexual discrimination and retaliatory discharge. Petitioners accepted and received settlement for their claims from Wayne County and the Wayne County Sheriff's Department and signed a corresponding release form. Respondent Nutt moved for dismissal based on the settlement, and, following a bench trial, the district court dismissed the action in accordance with the current majority holding of the Circuit Courts that there is no individual liability under Title VII. Petitioners appealed to the Sixth Circuit Court which held that Respondent could be sued in his "official capacity as Sheriff of Wayne County" and remanded the cause to the District Court. The District Court, again bowing to the "greatest weight of recent legal authority," dismissed the action with prejudice, on the ground that Title VII does not allow for individual liability. Petitioners again appealed to the Court of Appeals for the Sixth Circuit, raising the issue of Sheriff Nutt's liability in both his individual and his official capacity. Shortly before hearing the case, the Sixth Circuit had issued an opinion that no individual liability exists under Title VII, making it the ninth of twelve circuits to hold such an opinion. *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997). In keeping with the *Wathen* ruling, the Sixth Circuit held that Sheriff Nutt could not

be held liable in an individual capacity, and based on the release signed by Petitioners, he could not be held liable in his official capacity. Accordingly, the Sixth Circuit affirmed the District Court's dismissal of the case.

ARGUMENT

Seeking a means of heaping additional liability on Respondent, Petitioners argue that this Court should grant a writ of certiorari and decide the issue of individual liability under Title VII because the courts of appeal "have not been able to agree." (Petitioner's brief, p. 9) However, they concede that of the twelve circuits, nine have agreed that there is no individual liability and two have not yet addressed the issue. (See *Tomka v. Seiler Corp.*, 66 F.3rd 1295 (2d Cir. 1995), *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996), *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994), *Wathen v. General Electric Co.*, 115 F.3d 400 (6th Cir. 1997), *Miller v. Maxwell's International, Inc.*, 991 F.2d 583 (9th Cir. 1993), *Haynes v. Williams*, 88 F.3d 898 (10th Cir. 1996), *Cross v. State of Alabama*, 49 F.3d 1490 (11th Cir. 1995) and *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995)). Only the Fourth Circuit has held that individual liability may exist for some narrowly defined supervisory employees. *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989). However, even the Fourth Circuit Court appears to be joining the majority opinion that individual liability is not appropriate under Title VII. Five years after *Paroline*, in *Birkbeck v. Marvel Lighting Corp.*, the Fourth Circuit refused to apply individual liability in an age discrimination case. 30 F.3d 507 (4th Cir. 1994). In its interpretation of the Age Discrimination in

Employment Act (ADEA), the Court relied heavily on *Miller v. Maxwell's International, Inc.*, 991 F.2d 583 (9th Cir. 1993), a Ninth Circuit Court case determining that individual liability was not proper under Title VII. The Court reasoned that the two acts were similar in that Title VII applies only to employers of fifteen or more and the ADEA applies only to employers of twenty or more. The Court explained that the purpose of the minimum employee threshold could "only be to reduce the burden of the ADEA on small business" and that it "would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more." *Birkbeck*, 30 F.3d 507, 510. Especially indicative of the Fourth Circuit's opinion that individual liability does not exist under Title VII was this statement: "Employer liability ensures that no employee can violate the civil rights laws with impunity, a safeguard that has proven sufficient with respect to Title VII, the ADEA's closest statutory kin." Thus, the Circuits can hardly be said to be in a heated controversy over this issue. An examination of the some of the various circuit cases reflects the unity of their holdings and analysis.

One of the leading cases on this issue is *Miller v. Maxwell's Intern, Inc.*, in which Plaintiff Miller had brought a Title VII claim against her employer Maxwell's Intern, Inc., as well as several individual employees. 991 F.2d 583 (9th Cir. 1993). Following settlement with her employer, Maxwell's, Plaintiff attempted to maintain her action against the various employees as individuals. Rejecting Plaintiff's statutory construction argument

regarding the agent clause, the Court reasoned that "the obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute." *Miller*, 991 F.2d 583, 587, quoting the district court below. In reaching its decision, the Court considered that Congress had limited the application of Title VII to employers of fifteen or more employees so as to lessen the financial burden on small entities. To then apply that same burden to an individual would be incongruent. The *Miller* case exemplifies the interpretive conflict in the present case. The question is whether the phrase "and any agent of such a person" at the end of the definition of "employer" in 42 U.S.C. § 2000e means that individual agents are intended to bear the same liability as their business employers or that a business employer must take responsibility for the discriminatory actions of its agents. Respondent would argue, in conjunction with nine of the ten circuits which have addressed this issue, that the latter interpretation is correct.

Petitioners suggest that the nine circuit courts which have held against individual liability have approached the language of Title VII in an "overly simplistic" manner. (Petitioners' Brief, p. 10). Respondent would suggest that Petitioners are too simplistic in their approach to the statute by limiting its interpretation to the surface meaning of the agent clause. The Second Circuit Court in *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995), considered such a literal interpretation too "narrow," leading to results "Congress would never have contemplated." Building on the reasoning of *Miller*, the *Tomka* court took great pains to thoroughly investigate the legislative history of Title VII in determining Congressional intent. It

first considered the floor debate in which congressional members discussed the minimum employee threshold and various burdens imposed on businesses by Title VII liability. Had Congress been willing to place the full brunt of Title VII liability on an individual, it would not have limited its application to businesses of fifteen or more employees. Of additional importance to the *Tomka* court was the complete absence of discussion of the effect of liability on *individuals* as agents of the employer, a fact not disputed by Petitioners. Additional evidence of congressional intent is the damages scheme placing caps on liability in accordance with the size of the employer. (42 U.S.C. § 1981a) Obviously, Congress was attempting to proportion the potential liability with the resources of the business-employer. The damages scheme loses all relevance and effectiveness in the face of individual liability. As the Courts in both *Miller* and *Tomka* pointed out, it makes no sense for Congress to protect businesses based on size, while leaving an individual fully exposed to liability. *Miller,* 991 F.2d 583, 587 and *Tomka,* 66 F.3d 1295, 1314. Petitioners fail to create even a weak argument against this reasoning, and state that "one can only speculate as to [the] purpose" of the liability caps. (Petitioners' Brief, p. 15).

The damages scheme was of particular importance to the Third Circuit Court in *Sheridan v. E.I. Dupont de Nemours and Company*. 100 F.3d 1061 (3rd Cir. 1996). The Court reasoned that the 1991 statutory amendment to Title VII, establishing a "detailed" sliding scale of damages for employers of fifteen or more but making no similar provisions for individuals was indicative that Congress never

intended individual liability. For the Court, the amendment "strongly suggests that Congress did not contemplate that such damages would be assessed against individuals who are not themselves the employing entity." *Sheridan*, 100 F.3d 1061, 1077.

Gary v. Long, a District of Columbia Circuit case, involved a Title VII claim following the Plaintiff employee Gary's rape by Defendant supervisor Long. 59 F.3d 1391 (D.C. Cir. 1995). The Court held that Defendant Long could not be held liable in his personal capacity under Title VII; rather, as the employer's agent, Plaintiff Gary's claim against Long "merged" with her claim against the employer agency. *Gary*, 59 F.3d 1391, 1399. Because all claims against the employer agency had been dismissed, Plaintiff Gary no longer had a cause of action against Defendant Long as an individual. In reaching its decision the Court expressly rejected Plaintiff's argument that under the "plain and unambiguous language" of the statute an individual agent qualifies as an employer for Title VII purposes. *Id.* The *Gary* case is identical to that of Petitioners; they have released the agency employer and no longer have a claim against the employee as an individual.

CONCLUSION

Petitioners, having settled and released all claims against Wayne County and the Wayne County Sheriff's Department, have waived all rights against Respondent in his official capacity. Therefore, the only remaining

cause of action against him must be brought in his individual capacity. At issue in this case is not the judgment, personality or morality of Defendant Nutt. At issue in this case is the appropriate interpretation and application of Title VII as regards *all* individual defendants. The vast majority of the circuits are in agreement that the individual liability sought by Petitioners is inappropriate. Congress has clearly demonstrated its intent, in congressional debate and in the construction of the statute itself, both originally and in later amendments, that individual liability not be within the scope of Title VII. Therefore, Respondent would respectfully request that writ be denied in this case.

Respectfully submitted,

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